

time he testified at the La Star hearing in January 1991, was unaware of Mr. Gilliland's involvement in those tasks. *Id.*

83. The record shows, in sum, that Richard Goehring was candid in his testimony in the La Star proceeding. As he openly acknowledged at the La Star hearing and here, he could have been more careful to make his meaning clear in all respects. TDS/USCC Ex. 7, Tab F, at 21-22. Although his categorical brevity may have raised a question about his candor, he made no effort to conceal or withhold facts or documents and was substantially correct on material matters.

Statements and Activities of Mark A. Krohse

84. Mark Krohse, an Accounting Manager at USCC, submitted a declaration in the La Star proceeding and later testified at the hearing. TDS/USCC Ex. 8, ¶¶ 1-2 & Tab N, Tab O, Tab R. The issue with respect to Mr. Krohse is whether he fully and accurately described the extent of his involvement in La Star. TDS/USCC Ex. 8, Tab L at 8, 65, Tab N at 1, Tab O at 1, Tab R at 1234.

85. At his deposition in the La Star proceeding in July of 1990, Mr. Krohse disclosed that his work on behalf of La Star consisted of preparing La Star's proposed budget, TDS/USCC Ex. 8, Tab L, at 8, 10, 18-19, 21, 29-31, 34, 47-55, 71; processing cell site option renewals, *id.* at 8-9, 11-12, 14-17, 21, 23, 32, 34; and the preparation and filing of La Star's 1988 and 1989 federal tax returns, *id.* at 64-65, 75-76. He also testified at that deposition that he was responsible for processing USCC's payment of legal, engineering, and other expenses incurred by La Star. TDS/USCC Ex. 8, Tab L, at 23, 36-39, 45, 63. Prior to the deposition, at least 27 documents reflecting Mr. Krohse's activity in La Star matters had been turned over to opposing counsel in response to discovery requests. TDS/USCC Ex. 1, ¶ 25 and Tab F.

86. Mr. Krohse's declaration submitted in the La Star proceeding in August 1990 stated in its entirety:

I am Accounting Manager for United States Cellular Corporation. I am not a member of the La Star Cellular Telephone Company ('La Star') Management Committee. All duties that I have performed for La Star have been done at the request of and under the direction of La Star's attorney, Arthur V. Belendiuk. In this capacity, I was involved in processing payments for renewals of La Star's cell site options. Also at the request of Mr. Belendiuk, I prepared a model budget for La Star, based on information provided by Mr. Belendiuk and La Star's consultants. I also forwarded a request from SJI Cellular, Inc. to Tele-

phone and Data Systems, Inc. to prepare tax returns for La Star. Any work I performed was approved by La Star's attorney or SJI Cellular, Inc.

TDS/USCC Ex. 8, Tab N, Tab O. At the hearing in the La Star proceeding, Mr. Krohse answered "yes" to the question whether he had included in his testimony "the sum total of things you've done for La Star." TDS/USCC Ex. 8, Tab R.

87. Although Mr. Krohse's declaration did not include all the details of each of his activities for La Star, he believed that he had identified all of the material tasks he had performed. TDS/USCC Ex. 8, ¶¶ 16-18. He would have included more information in the declaration if he thought it was necessary. *Id.*^{85/} He had no intent to withhold facts from the Commission and did not think he had any reason to withhold any facts. TDS/USCC Ex. 8, ¶ 18.

88. The only activity undertaken by Mr. Krohse that was not mentioned in his declaration was his processing of all of La Star's bills. This activity was already a matter of record in the proceeding based on his deposition testimony, TDS/USCC Ex. 8, Tab L, at 23, 36-39, 45, 63, and Mr. Krohse therefore could not have intended to conceal that matter from the Commission.

5. References to SJI's Activities.

89. In the La Star proceeding, Donald Nelson and Mark Krohse also made certain assertions about actions allegedly taken by SJI. The issue is whether this testimony intentionally overstated the nature and extent of SJI's role in the joint venture.

Donald Nelson About SJI

90. Donald Nelson made the following statements about the role of SJI in La Star's operation and governance:

JUDGE CHACHKIN: Has anyone else been involved in day-to-day management managing the affairs of La Star?

MR. NELSON: The Brady's, I'm sure, and the SJI people have.

^{85/} Neither La Star's counsel, with whom Mr. Krohse had worked in providing the declaration, nor USCC's counsel, advised him that his declaration needed to be as detailed as his deposition testimony had been, or that the declaration was deficient or misleading in any respect. TDS/USCC Ex. 8, ¶¶ 17-18.

JUDGE CHACHKIN: What do you mean by day-to-day management? What have the Brady's done as far as day-to-day management is concerned, when the next sentence says that you -- what you've been involved in up to now is litigious in nature. So, what day-to-day management have the Brady's been involved in?

MR. NELSON: I don't know.^{86/}

The Management Committee discussed the various options and unanimously agreed to follow a settlement plan proposed by Sinclair H. Crenshaw, a member of the Management Committee, appointed by SJI Cellular.^{87/}

All services provided by USCC to or on behalf of La Star were technical in nature and were provided at the specific request of SJI Cellular or the Management Committee, either directly or through La Star's counsel.^{88/}

It is now my understanding that Mr. John Brady, Jr. has been proposed as La Star's General Manager since 1983, having been so designated in its original 1983 application and again in its 1987 amendment.^{89/}

In making these statements, Mr. Nelson did not intend to mislead the Commission.^{90/}

91. Mr. Nelson has acknowledged that he inaccurately assumed that the Bradys were at the time of the La Star

^{86/} TDS/USCC Ex. 2, Tab J, Tr. 1350-1351.

^{87/} TDS/USCC Ex. 2, Tab R, August 1990 Declaration of H. Donald Nelson, at 3-4.

^{88/} TDS/USCC Ex. 2, Tab R, August 1990 Declaration of H. Donald Nelson, at 4.

^{89/} TDS/USCC Ex. 2, Tab R, August 1990 Declaration of H. Donald Nelson, at 5.

^{90/} As found above, Mr. Nelson honestly believed that SJI, not USCC, controlled La Star. See *supra* ¶¶ 34-35, 40-44. With that belief, Mr. Nelson did not have a reason to seek in his testimony to mislead the Commission by exaggerating SJI's involvement. Because he saw nothing incriminating about the facts, he lacked any motive to mislead.

proceeding involved in the day-to-day management of La Star. TDS/USCC Ex. 2, ¶ 67. La Star's activities were all related to litigation, and there thus was no need for any party to be involved on a "day-to-day" management basis. Mr. Nelson explains that because he knew that he was not involved in the day-to-day management of La Star, he assumed, without having personal knowledge, that the Bradys must have been involved in such "day-to-day" management.^{91/} Although that assumption may have been mistaken, the mistake was an honest assumption on Mr. Nelson's part. This is confirmed by the use of the phrase "The Brady's, I'm sure, . ." followed immediately by his candid indication that he did not know what they had done.

92. Mr. Nelson did correctly testify that Mr. Crenshaw of SJI proposed the plan that the La Star principals adopted as their position on settlement. TDS/USCC Ex. 3, ¶ 21; TDS/USCC Ex. 4, ¶10. Moreover, in referring to requests for assistance made to USCC directly by SJI, Mr. Nelson had in mind and accurately identified SJI's request that USCC complete La Star's income tax forms made directly to Mr. Nelson by Mr. Crenshaw. TDS/USCC Ex. 2, ¶ 75; TDS/USCC Ex. 2, Tab K. Mr. Nelson thus provided an example of what he also testified candidly was a limited type of occurrence.

93. Finally, Mr. Nelson's deposition testimony, where he testified that he was unaware of the identity of La Star's proposed general manager, TDS/USCC Ex. 2, Tab I, pp. 1435-37, 1450-52, must be compared to his later written testimony that "[i]t is now my understanding that Mr. John Brady, Jr. has been proposed as La Star's General Manager since 1983, having been so designated in its original 1983 application and again in its 1987 amendment." TDS/USCC Ex. 2, Tab T at 63. Mr. Brady was proposed as La Star's general manager. TDS/USCC Ex. 14, at 247. Mr. Nelson was not aware of this proposal when he first testified at his deposition. TDS/USCC Ex. 2, ¶ 79. His written and oral testimony in the La Star proceeding made clear that the basis for his understanding that Mr. Brady had been proposed as the general manager was his communication with counsel. *Id.* Indeed, his written testimony specifies that he is "now" aware of that fact. Because USCC was not a partner in La Star until 1987, Mr. Nelson had to be told of Mr. Brady's appointment in 1983, and was not told of this event until after his July 1990 deposition.

Mark Krohse about SJI.

94. Mark Krohse made the following statements about SJI:

^{91/} Mr. Nelson was aware that the Bradys received correspondence and telephone calls from La Star's counsel, Arthur Belendiuk. See *supra*, ¶¶ 41-44.

The request [for the 1988 and 1989 Federal] tax return[s] was sent to me by someone from Lafourche Telephone Company [SJI]. The TDS tax department completed the return and sent it in.^{92/}

- - - - -

I also forwarded a request from SJI Cellular, Inc. to Telephone and Data Systems, Inc. to prepare tax returns for La Star.^{93/}

- - - - -

Any work I performed was approved by La Star's attorney or SJI Cellular, Inc.^{94/}

The record is uncontradicted in showing that Mr. Krohse did not intend to mislead the Commission in making these statements concerning the role of SJI.

95. In 1989, Mr. Krohse was asked to complete federal tax returns for La Star. TDS/USCC Ex. 8, ¶ 12. He received one request from Arthur Belendiuk, La Star's attorney. *Id.* Later, USCC's Donald Nelson forwarded to him a similar request from SJI's Kit Crenshaw. *Id.* & Tab I. Mr. Krohse in turn forwarded the IRS materials to TDS's tax department with the request that they complete and file the return. *Id.* In December 1989, he received from Allison Compeaux at SJI, whom he understood to be Mr. Crenshaw's secretary, a fax cover sheet and IRS delinquency notice relating to the 1988 return. *Id.* & Tab J. He forwarded these documents to TDS's tax department as well. *Id.* He spoke with Allison Compeaux at SJI about the tax matter at least twice. *Id.*

96. Mr. Krohse's testimony about the request from SJI was a reference to Mr. Crenshaw's request to Mr. Nelson and Mr. Krohse's own communications with Mr. Crenshaw's secretary, Ms. Compeaux. *Id.* ¶ 16. Documentary evidence shows that Mr. Crenshaw sent a request to Mr. Nelson and that Mr. Krohse communicated with Mr. Crenshaw's secretary on the matter.

^{92/} TDS/USCC Ex. 8, Tab L, July 1990 deposition testimony of Mark Krohse, at 65.

^{93/} TDS/USCC Ex. 8, Tab N, August 1990 Declaration of Mark Krohse, at 1.

^{94/} TDS/USCC Ex. 8, Tab N, August 1990 Declaration of Mark Krohse, at 1.

TDS/USCC Ex. 8, Tabs I and J.^{95/} Mr. Krohse's reference to approval of his work by La Star's attorney or SJI similarly was a reference to the tax preparation work which SJI had asked USCC to handle. He meant simply that SJI had approved USCC's handling that work, which he thought was self-evident from the fact that SJI had made the request. TDS/USCC Ex. 8, ¶ 17. Mr. Krohse's references to the involvement of SJI in his statements in the La Star proceeding thus were in all material respects accurate and candid.

6. La Star's "Cost-Based" Rates

97. Mark Krohse also provided a statement supporting La Star's description of its proposed rates and charges as "cost-based." The statement was made first in La Star's original application, filed in 1983, and it was reiterated in the 1987 Amendment:

These goals [of La Star's proposed rate structure] are served by a cost-based tariff that will encourage full utilization of the wide range of the cellular system's capabilities.^{96/}

The same statement was set forth in La Star's direct written case under the declaration of Mr. Krohse in September 1990.^{97/}

98. In 1987, Mr. Krohse was asked to assist La Star's attorney Arthur Belendiuk in updating the budget and schedule of charges originally submitted in 1983. TDS/USCC Ex. 8, ¶ 7. In reviewing the budget, he relied in part on a computer budget model that USCC used to create budgets for its own cellular systems. *Id.* The computer budget model was a LOTUS program, into which several variables were input to create a budget for a specific market. *Id.* The drivers for the model included the projected number of system customers and projected churn rate,

^{95/} Mr. Krohse's July 1990 deposition testimony was inaccurate in indicating that the TDS tax department had signed both the 1988 and the 1989 returns. While the TDS tax department had signed the 1988 return, Mr. Krohse had signed the 1989 return. Mr. Krohse explains that either he understood the question to refer to the 1988 return or he had forgotten that he had signed the 1989 return. TDS/USCC Ex. 8, ¶ 14. He signs more than a hundred tax returns in a typical year, and there was no motive for him to have tried to mislead anyone into thinking that TDS rather than he had signed a return.

^{96/} TDS/USCC Ex. 14, 1987 Amendment, Exhibit 1-7, at 1.

^{97/} TDS/USCC Ex. 8, Tab Q, La Star Exhibit 10, at 1, 5.

projected minutes of usage per month, the costs associated with the system, the rates charged to customers, and the number of system employees. *Id.* ¶ 8.

99. The proposed subscriber charges set forth in the updated budget were developed by utilizing the projected costs of the system and determining, based on those costs, what rates would yield a reasonable return over time. *Id.* ¶ 9 & Tab D. Mr. Krohse then compared the rates used in the budget model with rates that were being currently listed for the New Orleans market in a cellular price and marketing letter. *Id.* He conducted that comparison to make sure that the rates input in the budget model were not out of line with what cellular operators were then actually charging in the New Orleans MSA. *Id.* Thus, the proposed rates in the La Star budget were a combination of the budget model projections and information from the pricing guide. *Id.*

100. In August 1990, Mr. Krohse was asked by La Star's counsel to sponsor a hearing exhibit showing La Star's schedule of proposed charges. TDS/USCC Ex. 8, ¶ 20 & Tab P. The exhibit was drafted by counsel and contained the proposed subscriber rates specified in the budget that Mr. Krohse had helped develop in 1987. *Id.* After reviewing the draft exhibit, Mr. Krohse discussed it with Mr. Belendiuk. *Id.* ¶ 20. Among other things, they discussed the statement in the draft that the proposed rates were "cost-based." *Id.* Mr. Krohse wanted to make certain that "cost-based" was the proper term. *Id.* After discussing it with Mr. Belendiuk, he was satisfied that this was appropriate terminology to describe the proposed rates. *Id.* The "Schedule of Proposed Charges" and Mr. Krohse's accompanying declaration were submitted in the hearing as La Star Exhibit 10. *Id.* & Tab Q. Mr. Krohse did not know at the time, and still does not know today, whether there was a reason for La Star to point out that its proposed rates were cost-based. *Id.* ¶ 20.

101. Mr. Krohse's description of La Star's proposed rates as "cost-based" had a reasonable basis and was made in good faith. In developing the budget and rate schedule, Mr. Krohse did factor in the estimated costs of the system. Before he formally certified the schedule of charges to the Commission, he assured himself, by consulting with La Star's counsel, that "cost-based" was the proper terminology for him to use. In any event, he had no motive to mislead the Commission because he knew of no reason why it would be advantageous for La Star to claim that its rates were cost-based.

CONCLUSIONS OF LAW

102. Summary decision resolving a misrepresentation or candor issue is appropriate under Section 1.251 of the FCC's Rules where there is no genuine issue as to any material fact for determination at the hearing. 47 C.F.R. § 1.251. Because deceptive intent is the *sine qua non* of misrepresentation or lack of candor, see *supra* ¶¶ 15-17, no genuine issue of material fact remains if there is no evidence of deceptive intent. The absence of deceptive intent may be established by uncontradicted affidavits and sworn testimony of the principals whose candor is in question. *Ramon Rodriguez*, 4 FCC Rcd. 6817, 6817-18 (Rev. Bd. 1989), rev. denied, 5 FCC Rcd. 4041 (1990), *aff'd sub nom. David Ortiz Radio Corp. v. FCC*, 941 F. 2d 1253, 1258 (D.C. Cir. 1990). See also *Richard Bott II*, 9 FCC Rcd. 514 (ALJ 1994) (resolving candor issue in applicant's favor by summary decision); *WXBM-FM, Inc.*, 6 FCC Rcd. 7356 (ALJ 1991) (same); *Charles B. Shafer*, 5 FCC Rcd. 3029 (ALJ 1990) (same); *Mexican-American Communications Entertainment Broadcasting Group*, 5 FCC Rcd. 3859 (ALJ 1990) (same).

103. The record here is fully adequate to permit the determination that USCC and its principals were candid in the *La Star* proceeding, a determination that the Commission was unable to make on the basis of the incomplete record in that proceeding. In response to the Bureau's comprehensive Bill of Particulars and the *HDO*, TDS and USCC have submitted sworn testimony from eleven individuals, specifically including their witnesses in the *La Star* proceeding, H. Donald Nelson, Richard W. Goehring, and Mark A. Krohse. The uncontradicted sworn testimony of those persons has been independently corroborated by the testimony of consultants and other principals and by contemporaneous documents now in the record.^{98/} TDS and USCC thus have established that USCC's witnesses were candid and that the evidence they presented was true to the best of their knowledge. None of USCC's principals had any intent to misrepresent facts or mislead the Commission in statements they made in the *La Star* proceeding.^{99/}

^{98/} In the present case, the decision is summary in nature only because the witnesses have not been presented for oral direct and cross-examination. Extensive written direct cases have been presented by TDS, USCC and the Bureau and are part of the record. See Tr. at 65-374.

^{99/} The fact that USCC maintained throughout the *La Star* proceeding that it did not control *La Star* when the Commission has held otherwise does not provide any basis for finding that USCC misrepresented facts or lacked candor. USCC in good faith believed it did not control *La Star*. See *supra* ¶¶ 30-36. The unsuccessful pursuit of that good faith claim by *La Star* and USCC before the Commission is not a basis for a finding of misrepresentation or lack of candor.

104. In a few instances, the statements made by the principals in the *La Star* proceeding were inaccurate or should have been qualified or supplemented with additional information to make their meaning clear. These instances were inadvertent and did not amount to a lack of candor. The witnesses believed they were testifying truthfully and were unaware that in some instances, their testimony was subject to being understood in a manner that was different from what they intended. For the most part, inaccuracies or variance in interpretation arose from answers being given on cross-examination that arguably undercut written testimony. Because the answers given on cross-examination were consistent with the information provided by these witnesses during discovery several weeks before the provision of the written testimony, it is evident that any variances arose from different perspectives on the facts and testimony and not from any attempt to mislead the Commission.

105. Because the record demonstrates beyond any reasonable dispute that the statements made by USCC's principals were true or that there was no deceptive intent underlying any misstatements, USCC did not make misrepresentations or lack of candor. USCC therefore has not violated Section 1.17 of the FCC's Rules. The record reflects no facts that detract from the qualifications of TDS and USCC to be licensees of the Commission, TDS and USCC therefore are fully qualified to be Commission licensees.

106. No genuine issue of material fact remains to be tried concerning the candor of TDS and USCC in the *La Star* proceeding. The issuance of a decision therefore is warranted (a) resolving Issue 1 in favor of USCC, (b) finding under Issue 2 that TDS and USCC are fully qualified to hold the cellular authorization for the RSA, (c) determining that no forfeiture against TDS or USCC is appropriate in light of the resolution of Issue 1, and (d) granting the application of TDS, as amended, for the RSA.

RULINGS

107. IT IS ORDERED that unless an appeal from this Decision is taken by a party, or the Commission reviews this Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. § 1.276, the application of Telephone and Data, Systems, Inc., as amended to reflect Wisconsin RSA No. 8 Limited Partnership as the applicant (File No. 10209-CL-P-715-B-88) for a construction permit for facilities in the Domestic Public Cellular Telecommunications Radio Service in Market 715, Block B, the Wisconsin 8 - Vernon Rural Service Area, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

Certificate of Service

I, Gayle C. Kosarin, hereby certify that on this 31st day of July, 1995, copies of the foregoing Joint Motion For Summary Decision were served via first class, postage-paid United States mail on the following:

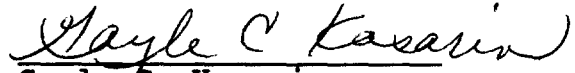
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